(1) 88-1247

No._____

Supreme Court, U.S.
FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term 1988

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SYDNEY BERDE
Counsel of Record
WILLIAM L. SIPPEL
DOHERTY, RUMBLE & BUTLER
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101
(612) 291-9286
Counsel for Petitioner

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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QUESTIONS PRESENTED

Respondent National Farmers Organization (NFO) is organized for the purpose of exercising market power on behalf of its dairy farmer members to increase the price they receive from the sale of their raw milk. It operates, nationally, as a marketing agent for producers of milk and other agricultural products. The Court of Appeals held that NFO suffered "antitrust injury" in the form of lost future membership dues and marketing fees from dairy farmers whom NFO failed to attract as members by reason of a conspiracy engaged in by petitioner and other dairy farmer cooperatives to monopolize a ten state area of the Midwest which was never proven to constitute a relevant market under the Sherman Act. Two basic questions of antitrust law are presented:

1. Whether a national non-profit collective bargaining association of farmers which claims the right to engage in horizontal price-fixing on behalf of its members by reason of an antitrust exemption conferred by §6 of the Clayton Act, 15 U.S.C. §17 and the Capper-Volstead Act, 7 U.S.C. §291, suffers "antitrust injury" when its future membership dues and marketing fees income is allegedly reduced by a conspiracy which interferes with the association's membership growth?

2. Whether proof of a properly defined relevant geographic market is necessary to show market power in a conspiracy to monopolize claim under § 2 of the Sherman Act or a Rule of Reason conspiracy to restrain trade under §1?

Petitioner also adopts two additional questions presented to the Court in a petition being filed by co-petitioners Associated Milk Producers, Inc. and Mid-America Dairymen. The two additional questions presented, arising out of the opinions below, are:

1. Whether the established antitrust principle that the fact-finder may make a "just and reasonable estimate of the damage" caused by an antitrust violation:

(a) permits an antitrust plaintiff to prove the evidentiary basis for its damage estimate by less than "a preponderance of the evidence";

(b) allows an appellate court to shift to the defendant the burden of proof as to the measure of the plaintiff's damages; and

(c) permits an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition?

2. Whether there is an "antitrust damages" exception to Rule 52(a) that permits an appellate court, based on its holding that the district court's findings rested on an "inappropriate legal standard" of proof, to review the record *de novo*, make its own witness credibility assessments and factual findings, and mandate an award of substantial damages, rather than remanding the case to the district court to reconsider its findings under the standard articulated by the appellate court?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 28.1, Counsel for Petitioner certify that the following is a complete list of all parties to the proceedings below:

Associated Milk Producers, Inc., Mid-America Dairymen, Central Milk Producers Cooperative and National Farmers Organization.

Petitioner Central Milk Producers Cooperative has no parent or subsidiaries and has the following members as affiliates:

Alto Cooperative Creamery
Waupun, Wisconsin

Associated Milk Producers, Inc.
Schaumburg, Illinois

Golden Guernsey Dairy
Cooperative
Milwaukee, Wisconsin

Greenwood Milk Products
Cooperative
Greenwood, Wisconsin

Independent Milk Producers
Cooperative
Slinger, Wisconsin

Lake to Lake Dairy
Cooperative, Division of
Land O' Lakes, Inc.
Manitowoc, Wisconsin

Manitowoc Milk Producers
Cooperative
Manitowoc, Wisconsin

Mid-West Dairymen's
Cooperative
Rockford, Illinois

Milwaukee Cooperative
Milk Producers
Brookfield, Wisconsin

Outagamie Producers
Cooperative
Black Crook, Wisconsin

Pine Rivers Farmers Dairy
Cooperative
Merrill, Wisconsin

Southern Milk Sales, Inc.
Jefferson, Wisconsin

Wisconsin Dairies
Cooperative
Baraboo, Wisconsin

Woodstock Progressive
Milk Producers
Woodstock, Illinois

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	iii
Table Of Authorities	vi
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement Of The Case	3
Reasons For Granting The Writ	10
I. Certiorari Should Be Granted To Instruct The Lower Courts That The Antitrust Treble Damage Remedy Is Intended To Compensate For Loss Resulting From Anticompetitive Conduct That Reduces Output Or Raises Prices To Consumers In The Relevant Market	12
II. The Eighth Circuit's Decision Demonstrates A Major Conflict Among The Circuits On Whether Proof Of A Relevant Geographic Market Is Necessary In A Conspiracy To Monopolize Case Under Section 2 Of The Sherman Act	19
A. The Eighth Circuit's Decision Illustrates A Conflict Among The Circuits And With The Decisions Of This Court	20
B. In Holding That Business Conduct May Be Condemned As "Unreasonable" Under The Sherman Act In The Absence Of A Defined Relevant Geographic Market, The Court Of Appeals Has Unsettled And Confused The Settled Course Of Decisions In Rule Of Reason Antitrust Cases	25
Conclusion	30

APPENDIX *

A. Statutory Provisions Involved
Sherman Act §1, 15 U.S.C. §1
Sherman Act §2, 15 U.S.C. §2
Capper-Volstead Act, §1, 7 U.S.C. §291
Clayton Antitrust Act, §4, 15 U.S.C. §15
Clayton Antitrust Act, §6, 15 U.S.C. §17 ..... 1a

B. Opinion Of The United States Court Of Appeals For The Eighth Circuit, July 5, 1988, (850 F.2d 1286) 3a

C. Judgment Of The Court Of Appeals, July 5, 1988 ..... 61a

D. Order, United States Court Of Appeals Denying Petition For Rehearing, *En Banc* And Rehearing By The Panel, September 13, 1988 ..... 63a

E. Opinion Of The United States District Court For The Western District Of Missouri, July 5, 1985 (614 F. Supp. 745) 65a

F. Opinion Of The United States District Court Of Appeals For The Eighth Circuit, August 31, 1982 (682 F.2d 1173) 231a

G. Opinion Of The United States District Court For The Western District Of Missouri, January 29, 1981 (510 F. Supp. 381) 297a

H. Order, United States Court of Appeals For The Eighth Circuit, Denying Petitions For Rehearing And Suggestions For Rehearing *En Banc*, November 12, 1982 ..... 603a

I. NFO Legal Brief Re Damages, June 30, 1975 .... 605a

* Petitioner's Appendix is separately bound. Citations to the Appendix are designated as "—a".

TABLE OF AUTHORITIES

Cases: Page

Adams v. Pan American World Airways, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1109 (1988) 10

American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963) 20

Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) 20

Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983) ..8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 25

Ball Memorial Hospital v. Mutual Hospital Insurance, 784 F.2d 1325 (7th Cir. 1986) 21, 28

Baxley-De Lamar Monuments v. American Cemetary Association, 843 F.2d 1154 (8th Cir. 1988) 27

Belfiore v. New York Times Co., 826 F.2d 177 (2nd Cir. 1987) 22, 27

Besser Publishing Co. v. Pioneer Press, Inc., 571 F.Supp, 640 (N.D. Ill. 1983) 21, 27

Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341 (11th Cir. 1983) 21

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 10, 18

Broadcast Music, Inc. v. Columbia Broadcast Sys., 441 U.S. 1 (1979) 26

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 10, 11, 15, 16, 18, 20, 26

Page

California State Council v. Associated General Contractors of California, 648 F.2d 527 (9th Cir. 1980) 18

Christianson v. Colt, —— U.S. ——, 108 S.Ct. 2166 (1988) 8

Coleman Motor Co. v. Chrysler Corp., 376 F.Supp. 546 (W.D. Pa. 1974) 27

Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F.Supp. 225 (S.D.N.Y. 1983) 22

Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 26

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 18

Donohue v. Pendelton Woolen Mills, 633 F.Supp. 1423 (D.C.N.Y. 1983) 11

Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 239 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) 20

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 25, 26, 29

Hamilton Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1961) 8

Hornsby Oil Co., Inc. v. Champion Spark Plug Co., 714 F.2d 1384 (5th Cir. 1983) 20

Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) 21

In re Industrial Gas Litigation, 682 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983) 10

Page

In re Midwest Milk Monopolization Litigation,
510 F.Supp. 381 (W.D. Mo. 1981) 2, 4, 5, 6, 7

Indianapolis v. Chase National Bank,
314 U.S. 63 (1941) 8

International Ass'n of Heat & Frost Insulators
v. United Contractors Ass'n.,
483 F.2d 384 (3rd Cir. 1973) 18

International Distribution Centers, Inc. v. Walsh
Trucking, 812 F.2d 786 (2d Cir. 1987) 27

Kaplan v. Burroughs Corp.,
611 F.2d 286 (9th Cir. 1979) 26

Jack Walters & Sons Corp. v. Morton Buildings,
Inc., 737 F.2d 698 (7th Cir.), *cert. denied*,
469 U.S. 1018 (1984) 10, 15

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984) 26

Karlinsky v. New York Racing Association, Inc.,
517 F.2d 1010 (2d Cir. 1975) 22

Maryland & Virginia Milk Producers Assoc., Inc.
v. United States, 362 U.S. 458 (1960) 17

National Collegiate Athletic Association v. Board
of Regents, 468 U.S. 85 (1984) 18, 26

National Farmers' Organization, Inc. v. Associated
Milk Producers, Inc., *et al.*,
850 F.2d 1286 (8th Cir. 1988) 2, 3, 9, 10

National Farmers' Organization, Inc. v. Associated
Milk Producers, Inc., *et al.*,
614 F.Supp. 745 (D.C. Mo. 1985) 2, 5, 9

National Farmers' Organization, Inc. v. Associated
Milk Producers, Inc., *et al.*,
687 F.2d 1173 (8th Cir.), *cert. denied*,
461 U.S. 937
(1982) 2, 3, 4, 5, 6, 7, 8, 12, 13, 15, 16, 22, 23, 25, 28

Page

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 26

Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982) vacated 460 U.S. 1007 (1983), *reinstated on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) 10, 13

Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) 21

Patterson Parchment Paper Co. v. Story Parchment Co., 37 F.2d 537, 538 (1st Cir. 1930), *rev'd*, 282 U.S. 555 (1931) 23

Rea v. Ford Motor Co., 335 F.Supp. 842 (W.D. Pa. 1973) 27

Reiter v. Sonotone, 442 U.S. 330 (1979) 11

Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818 (6th Cir. 1982) 21

Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987) 28

Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975) 21

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931) 23

Superior Court Trial Lawyers Association v. Federal Trade Commission, 856 F.2d 226 (D.C. Cir. 1988) 29

Tire Sales Corp. v. Cities Service Oil Co., 410 F.Supp. 1222 (N.D. Ill. 1976) 21

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976) 18

Page

TV Signal Co. of Aberdeen v. American Telephone and Telegraph, 617 F.2d 1302 (8th Cir. 1980) 28

United States v. Columbia Steel Co., 334 U.S. 495 (1948) 25

United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1971) 8, 21, 22, 23

United States v. Dupont de Nemours, 351 U.S. 377 (1956) 23

United States v. Grinnell Corp., 384 U.S. 563 (1966) 24

United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951) 21

United States v. Yellow Cab Co., 332 U.S. 218 (1947) 23

USA Petroleum v. Atlantic Richfield Co., 859 F.2d 687 (9th Cir. 1988) 10

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) 24

Wyandotte Co. v. United States, 389 U.S. 191 (1967) 16

Statutes and Legislative Materials:

Agricultural Fair Practices Act, 7 U.S.C. §2301-2307 5

Capper-Volstead Act, 7 U.S.C. §§291-292 ..... 3, 16

Clayton Act

Section 4, 15 U.S.C. §15 ..... 3, 14, 17

Section 6, 15 U.S.C. §17 ..... 3, 17

Section 11, 15 U.S.C. §26 3

Page

Federal Trade Commission Act
Section 5, 15 U.S.C. §45 25
Internal Revenue Code §501(c)(5) 4
Sherman Act
Section 1, 15 U.S.C. §1 ..... *passim*
Section 2, 15 U.S.C. §2 ..... *passim*
28 U.S.C. §1254(1) 2
28 U.S.C. §1337 3

Rules and Regulations:
7 C.F.R. Part 1030 *et seq.* 5

Miscellaneous:
Areeda & Hovenkamp, *Antitrust Law* (Supp. 1988) 10, 11, 15
3 Areeda & Turner, *Antitrust Law* (1978) 29
7 Areeda & Turner, *Antitrust Law* (1986) 29
R. Bork, *The Antitrust Paradox* (1978) 11
Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. Law Rev. 467 (1980) 11
The Relevant Market Concept and Conspiracy to Monopolize Cases Under Section 2 of the Sherman Act, 44 U. Chi. L. Rev. 805 (1977) 24

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NATIONAL FARMERS ORGANIZATION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Central Milk Producers Cooperative (CMPC), respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit entered in this matter on July 5, 1988 which reversed the decision of the United States District Court for the Western District of Missouri denying an award of damages to the respondent National Farmers Organization (NFO) under §4 of the Clayton Act.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the district court's judgment denying NFO's claim for damages is published as *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., et al.*, 850 F.2d 1286 (8th Cir. 1988) (3a-59a). The opinion of the district court denying NFO's damage claim is published at 614 F.Supp. 745 (D.C. Mo. 1985) (65a-230a). The prior opinion of the Court of Appeals reversing and remanding for determination of damages the district court's prior decision dismissing NFO's antitrust claims is reported at 687 F.2d 1173 (8th Cir. 1982) (231a-296a). The district court's prior opinion dismissing NFO's §§1 and 2 Sherman Act claims is reported as *In re Midwest Milk Monopolization Litigation*, 510 F.Supp. 381 (W.D. Mo. 1981) (297a-602a).*

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit reversing and remanding the case to the district court for further proceedings was entered on July 5, 1988. (61a-62a). A timely petition for Rehearing and Suggestions for Rehearing *En Banc* was denied on September 13, 1988. (63a).** By Justice Blackmun's December 3, 1988 Order the time for filing this petition was extended to January 26, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

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* The Court of Appeals has designated the three prior opinions, 510 F.Supp. 381; 687 F.2d 1173 and 614 F.Supp. 745, as NFO I, II and III respectively. 850 F.2d at 1289, 5a. That designation, with the addition of 850 F.2d as NFO IV, will be followed *infra*.

** Judges Bowman and Magill would have granted the Petition.

STATUTES INVOLVED

Respondent's complaint alleges violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1,2, and the case involves §§4 and 6 of the Clayton Act, and the Capper-Volstead Act 7 U.S.C. §§291-292. Relevant portions of the statutory provisions involved are reproduced in the separately bound Appendix at 1a-2a.

STATEMENT OF THE CASE

This 17 year old court tried case, twice appealed to the Eighth Circuit, arises out of competition for dairy farmer membership between respondent NFO, a national collective bargaining association of farmers, and three "Capper-Volstead" cooperative milk marketing associations.* The Eighth Circuit determined that, notwithstanding NFO's failure to prove a "relevant geographic market" (NFO II, 258a-259a) or anticompetitive effect in any market, petitioner CMPC, Mid-America Dairymen, Inc. (Mid-Am) and Associated Milk Producers, Inc. (AMPI) were guilty of a conspiracy to monopolize the sale of raw milk in the "ten-state midwestern region" where NFO operated by stunting NFO's membership growth causing it to lose future membership dues and marketing fees from potential dairy farmer members whom NFO failed to attract. (NFO IV, 4a, 24a-33a, 57a).

This petition raises the issue of whether the Eighth Circuit was wrong in concluding: *first*, that the antitrust laws provide a damage remedy for losses which weaken a seller's power to fix prices or achieve market power, and *second*, that

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* Jurisdiction in the district court was invoked by claimants and counterclaimants under 28 U.S.C. §1337, and 15 U.S.C. §§15 and 26.

"relevant geographic market" proof is not a necessary element of a Section 2 Sherman Act conspiracy to monopolize claim and a Section 1 non-*per se* claim.

1. The Parties. Respondent NFO is a nationwide farm bargaining organization incorporated as a non-profit membership corporation under Iowa law. Originally organized in 1955 as a protest and lobbying organization against federal agricultural policy, it amended its articles of incorporation in 1957 to add as its purpose collective bargaining "on a non-pecuniary basis for prices, terms and conditions of sale" of its members' farm products. (NFO I, 308a; NFO II, 235a.) NFO's avowed purpose is to "unite into one organization . . . all farmers engaged in the production of agricultural commodities" (NFO II, 308a) and thereby to exercise sufficient market power to raise commodity prices paid to farmers. (NFO II, 235a).[1] To obtain the price it desires, NFO's bargaining strategy has included picketing and "holding actions" comparable to a strike in the labor field. (NFO I, 310a).

NFO receives member dues and "checkoff" fees from the proceeds of the sale of its members' farm products. In the case of milk such proceeds are paid by the buyer to an "NFO Dairy Trust" which, in turn, deducts and remits to NFO such dues and "checkoff" as the member has authorized to defray NFO's collective bargaining expense. (NFO II, 243a, 293a-294a; NFO I, 324a)[2]

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[1] NFO's objective is to "block or unite enough production under control of [its] members so that those members can . . . name their price, and if the price wasn't paid, to hold the production." (NFO I, 348a).

[2] NFO is organized in such a way that it has no earnings or net income from the sale of its members' milk. (NFO I, 309a). In 1957 the IRS ruled NFO to be exempt from federal income tax as a non-profit membership organization pursuant to I.R.C. §501(c)(5).

Mid-Am and AMPI are both cooperative associations of dairy farmers engaged in collectively marketing the milk of their members to "handlers" who operate fluid milk bottling plants throughout the Midwestern region of the United States. Petitioner CMPC is a federated cooperative marketing agent for fourteen dairy cooperatives whose dairy farmer members, located principally in Wisconsin, supply milk to handlers regulated under Federal Milk Order No. 30 (7 CFR Part 1030) which regulates the handling of milk in a geographic area described as the "Chicago Regional Marketing Area". 7 CFR §1030.2. (NFO II, 235a, 262a-263a).

2. The District Court Proceedings. Mid-Am began this case in 1971 when it filed an antitrust treble damage action against NFO alleging that NFO violated §1 of the Sherman Act by engaging in illegal price-fixing in the sale of its members' raw milk and promoting a group boycott of Mid-Am among dairy farmers including Mid-Am's own members. (NFO II, 236a). NFO filed an antitrust counterclaim against Mid-Am, AMPI and CMPC as counterclaim defendants. AMPI then counterclaimed against NFO alleging the same price-fixing claims asserted by Mid-Am plus claims for attempted monopolization and violations of the Agricultural Fair Practices Act. 7 U.S.C. §§2301-2307. (*Ibid.*).[3]

NFO's counterclaim alleged that CMPC, AMPI and Mid-Am monopolized, attempted to monopolize and conspired to monopolize and restrain trade in the marketing of raw milk in violation of the Sherman Act in a "ten state region" of the

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[3] Mid-Am's case against NFO (Phase I), NFO's counterclaim (Phase II) and AMPI's counterclaim (Phase III) were tried separately to the court. (NFO I, 301a). The district court's Phase I and III judgments in favor of NFO were affirmed on appeal. (NFO II, 250a, 256a).

Midwest or "ten federal order markets therein" [4] (NFO II, 258a). NFO claimed that the three cooperatives acted to depress the price received by NFO members for the sale of their milk and to stifle NFO's growth by depriving its members of access to milk buyers in various markets of the Midwest. (NFO II, 261a-264a). NFO claimed damages totaling $14,064,068, consisting of $12,851,000 of "lost [market] penetration damages" attributable to unrealized member dues and "checkoff" fees from stifled growth and $1,213,000 of "price reduction damages" allegedly suffered by its members. (NFO I, 301a, 404a n.27; *see* NFO II, 291a-292a).

NFO's "Phase II" counterclaim, tried to the court over an eighteen month period (NFO II, 256a) [5] in a trial consisting of 75 live witnesses, excerpts from over 100 depositions, 4800 exhibits and over 15,000 pages of transcript (NFO II, 233a), resulted in a judgment dismissing NFO's antitrust claims. The district court made the "ultimate determination that . . . NFO failed to carry the burden of proof in regard to all Phase II issues necessary to establish liability on the part of counterclaim defendants." (NFO I, 403a). The court specifically found that NFO failed to prove a properly defined relevant geographic market and that the defendant cooperatives did not monopolize, attempt or conspire to monopolize or restrain the marketing of raw milk in any properly defined market. (NFO I, 548a-549a).

Though petitioner CMPC had urged from the outset that NFO lacked standing to sue for alleged "price reduction"

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[4] A "federal order market" is a defined geographic area in which the marketing of raw milk delivered by producers and processed and sold by "handlers" is regulated by the Secretary of Agriculture. (NFO I, 420a).

[5] The case was "pretried" over a six year period with trial commencing in November, 1977.

damages suffered by its members or for the loss of membership dues or marketing fees, the district court concluded that it was unnecessary to reach the question of whether "NFO may not have standing to maintain this action" or "whether NFO's 'reduced price' and 'market penetration' damage claims may be speculative, conjectural and not legally permissible". (NFO I, 550a).

3. The First Court of Appeals Proceedings. On appeal, the Eighth Circuit affirmed the district court's Phase II [6] dismissal of NFO's actual and attempted monopolization claim because of NFO's failure to show that the defendant cooperatives had, or were in danger of achieving, "monopoly power in a properly defined market or submarkets" (NFO II, 259a) but reversed as to the conspiracy to monopolize claim, however, on the grounds that "relevant market is not a necessary element of such a claim because actual attainment or 'dangerous probability' of monopoly power are not at issue". (NFO II, 260a). The court then resurrected the plaintiff's Section 1 claim which had been tried under the Rule of Reason, concluding that "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade." (*Ibid.*). The Court of Appeals never found that defendants' conduct caused an anticompetitive effect in any relevant geographic market.

According to the Eighth Circuit, a Section 2 claim for conspiracy to monopolize does not require proof of a relevant market "because the essential elements of a Section 2 conspiracy claim are concerted action and specific intent to mo-

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[6] The Eighth Circuit also affirmed dismissal of Mid-Am's and AMPI's Phase I and II claims but on different grounds. The Court of Appeals concluded that NFO engaged in horizontal price-fixing but held that its price-fixing on behalf of its members was exempt conduct under the Capper-Volstead Act. (NFO II, 241a-250a, 256a).

nopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce.' *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971). . . ." (NFO II, 238a).

As to petitioner's argument that NFO lacked standing to maintain the action (which the district court failed to address), the Eighth Circuit agreed that NFO lacked standing to recover "price reduction" damages suffered by its members (NFO II, 292a) but held that NFO could recover lost membership dues and fees because such losses "represent direct injury to NFO in its 'business or property'." (NFO II, 293a). The court remanded "for a determination of the amount of damages NFO may recover" (NFO II, 233a) with instructions that the district court "may . . . conduct such further proceedings and make such new findings as may be appropriate to ensure that the determination of damages . . . can be made consistent with this opinion." (NFO II, 296a). Appellees' petition for rehearing *en banc* and suggestions for rehearing by the panel was denied (603a) and this Court denied CMPC's petition for certiorari to review the questions presented by this petition. (461 U.S. 937).[7]

4. *Proceedings On Remand.* On the basis of this Court's intervening decision in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983) (*AGC*), petitioner CMPC

[7] The denial of certiorari does not preclude its grant at a later time so long as the case remains *sub judice*, and the decision of the Court of Appeals on the first appeal remains open for review by this Court though it may have been followed as the law of the case by the district court on remand and on the second appeal. *Christianson v. Colt*, —— U.S. ——, 108 S. Ct. 2166, 2178 (1988) ("A petition for writ of certiorari can expose the entire case to review"); *Indianapolis v. Chase National Bank*, 314 U.S. 63, 72, 75 (1941); *Hamilton Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1961).

and the other counterclaim defendants renewed their motion to dismiss NFO's damage claim on the grounds that application of the multifactor antitrust standing analysis mandated by *AGC*[8] precluded recovery by NFO of lost future membership dues and marketing fees from dairy farmer members whom NFO failed to attract by reason of counterclaim defendants unlawful conduct. The district court denied the motion, stating that "contrary to defendants basic contention . . . the Supreme Court did not make any substantial change in antitrust law when it handed down *AGC*". (NFO III, 69a).

As to its pursuit of the $14 million damage claim before the district court on remand "NFO elected not to adduce any new or additional evidence . . . but instead rel[ied] upon the evidence adduced and the theories originally advanced at trial." (NFO III, 82a). Following extensive briefing on the existing trial record and oral argument on the damage issues, the district court rejected NFO's damage expert's testimony as not "credible" and concluded that any award of damages to NFO "would necessarily be based on speculation and conjecture." (NFO III, 153a).

5. *The Second Appeal.* On appeal, the Eighth Circuit affirmed the district court's determination that the law of antitrust standing articulated by this Court's *AGC* decision did not preclude recovery of lost membership dues and marketing fees by NFO. (NFO IV n.4, 12a-13a).

As to the district court's rejection of NFO's "test market" or "yardstick" damage theory, the Eighth Circuit reversed and remanded the case to the district court with directions to accept NFO's "test market" theory "as a valid base from

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[8] "In our view, courts should analyze each situation [whether a party injured by an antitrust violation may recover treble damages] in light of the factors set forth in the text *infra*." 459 U.S. at 456 n.33.

which to determine the amount of damages and shall use the $7,403,374 claimed under the theory as a starting point" (NFO IV, 57a) reduced by approximately $2.3 million to reflect certain disallowed items and subject to further reduction, in the district court's discretion, to reflect "the effects of unlawful conduct later found to be lawful." (NFO IV, 58a).

REASONS FOR GRANTING THE WRIT

This case presents a clear-cut legal question concerning the meaning of the term "antitrust injury" as articulated by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)[9]—a question that has been "characterized by doctrinal confusion" [10] that this Court's later decisions in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) and *AGC, supra* 459 U.S. 519 have failed to resolve.[11]

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[9] "The single most striking development in the law of private antitrust enforcement, since . . . 1978 is the antitrust injury concept associated with the Supreme Court's *Brunswick* decision, which held that the antitrust laws compensate only injury related to the goals or purpose of the federal antitrust laws." P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶334.2a at 300 (Supp. 1988).

[10] *In re Industrial Gas Litigation*, 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983).

[11] *See e.g. Jack Walters & Sons Corp. v. Morton Builders, Inc.*, 737 F.2d 698, 708-709 (7th Cir.) *cert. denied*, 469 U.S. 1018 (1984) (denying standing to a retailer who alleges injury from a non-predatory vertical maximum price agreement among his competitors and their supplier); *contra, USA Petroleum v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). *See also, Adams v. Pan American World Airways*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1109 (1988) and *Industrial Gas Litigation, supra* (denying standing to employees whose loss did not reflect an injury from a restraint in product market competition which formed the basis of defendant's violation); *contra, Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) vacated in light of *AGC, supra*, 460 U.S.

The decision below warrants review to instruct the lower courts that §4 of the Clayton Act does not authorize recovery "for losses which are of no concern to the antitrust laws", *Brunswick, supra,* 429 U.S. at 487; that the purpose of the antitrust treble damage remedy is to compensate for losses stemming from restraints on competition in the relevant product market that increase price, reduce output and injure consumers,[12] and that derivative or consequential loss traceable to an antitrust violation is insufficient to support a treble damage recovery under §4 of the Clayton Act. (Point I).

The decisions below warrant review, also, to resolve a clear conflict among the circuits concerning the need for proof of a relevant geographic market in which to assess an anticompetitive effect in order to support a claim of injury to competition in a Rule of Reason case under §1 or conspiracy to monopolize case under §2 of the Sherman Act. (Point II).

1007 (1983); reinstated on remand, 740 F.2d 739 (9th Cir. 1984) (Kennedy J. dissenting), *cert. dismissed,* 469 U.S. 1200 (1985) and *Donahue v. Pendelton Woolen Mills,* 633 F.Supp. 1423 (D.C.N.Y. 1983) (granting standing). "Unfortunately the law of [antitrust] standing is not much clearer after *Associated* and *McCready* then it was before." P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶334.1b at 299 (Supp. 1988). *See also* Page, *Antitrust Damages and Economic Efficiency: An Approach To Antitrust Injury,* 47 U. Chi. Law Rev. 467 (1980): "Courts and commentators . . . have developed no coherent theory to guide the application of the antitrust injury doctrine in the award of damages for antitrust violations." (*Id.* at 467).

[12] "Congress designed the Sherman Act as a 'consumer welfare prescription'." *Reiter v. Sonotone,* 442 U.S. 330, 343 (1979); R. Bork, *The Antitrust Paradox* (1978) at 51: "The antitrust laws, as they now stand, have only one legitimate goal . . . the maximization of consumer welfare; therefore, . . . '[c]ompetition' must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree."

I. CERTIORARI SHOULD BE GRANTED TO INSTRUCT THE LOWER COURTS THAT THE ANTITRUST TREBLE DAMAGE REMEDY IS INTENDED TO COMPENSATE FOR LOSS RESULTING FROM ANTICOMPETITIVE CONDUCT THAT REDUCES OUTPUT OR RAISES PRICES TO CONSUMERS IN THE RELEVANT MARKET

In ordering a treble damage award to respondent NFO to compensate for its claimed loss of future membership dues and marketing fees the Eighth Circuit has ignored this Court's admonition that when a plaintiff's antitrust standing is challenged, the focal issue is the nature of the damages sought to be recovered and the relation of the claimed injury to the market restrained by defendant's antitrust violation. *AGC, supra* at 538. NFO seeks to recover

> [D]amages resulting from NFO's having been prevented from achieving the growth in its dairy program in the Midwest market which it would have achieved but for the conspiracy . . . . This failure to achieve market penetration has resulted in . . . (1) lost dues which NFO would have collected, (2) lost check-off revenues for milk which NFO would have but did not market. . . .[13]

The relevant product market which the Eighth Circuit concluded that petitioner, Mid-Am and AMPI conspired to restrain was the marketing of Grade A raw milk to independent buyers or "handlers" in a ten state Midwest region where NFO solicited dairy farmer membership. (NFO II, 257a, 261a-264a). The Eighth Circuit held that losses in the form of "price reduction" damages — forced by defendants' competi-

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[13] NFO Narrative Statement and Legal Brief Re Damages at 1399-1400, June 30, 1975. (App. I, 607a).

tion and reduced sales of milk to the "coerced" buyers — were suffered by and belong to NFO's members, not NFO. (NFO II, 292a). After noting that "[t]he price reduction issue may be relevant to NFO's damages in that by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume" *(ibid.)*, the Eighth Circuit held that NFO was entitled to recover as antitrust damages "lost fees and dues from those who stopped marketing through NFO" because "NFO, as a competitor, was a direct target of the unlawful conspiracy." (NFO II, 293a).

1. This Court has held that more must be shown to warrant recovery of antitrust damages than that a plaintiff, "as a competitor, was a direct target of the unlawful conspiracy." In *AGC*, this Court held that the plaintiff Union's right to recover damages for injury allegedly suffered by reason of the defendant's coercive conduct directed against contractors and developers who hired unionized firms "cannot be answered simply by reference to the broad language of § 4. Instead, . . . the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." 459 U.S. at 535. The Court noted that "the Union's allegation of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as at matter of law." 459 U.S. at 545.[14]

While the nature of the Union's injury in *AGC* was obscure (*id.* at 541 n.46), one theory of the Union's injury and damage discerned by this Court was that the defendant association of contractors illegally coerced the victim landowners to switch from union to non-union contractors employing non-union

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[14] *See Ostrofe v. H.S. Crocker, supra* at 751 Kennedy, J. dissenting.) ("Ostrofe's claim is within the square of this language and should be dismissed.")

workers thereby stunting the Union's membership growth with the result that "dues payments declined because its members lost jobs or wages". (*Ibid.*). Such damage, the Court said, is too "remote" and "indirect" to warrant recovery. *Ibid.*

In concluding that the plaintiff Union was not a person injured within the meaning of §4 of the Clayton Act, this Court directed the lower courts to "analyze each [§4 standing] situation in light of the factors set forth in the text . . ."*Id.* at 536 n.33.[15] Notwithstanding a plaintiff's demonstrated intended injury traceable to a defendant's antitrust violation, this Court said that §4 standing will be denied if: (1) the alleged injury is not the type the antitrust laws were intended to forestall (*id.* at 538-539); (2) there "is an identifiable class of" more directly injured antitrust victims "whose self interest would normally motivate them" to enforce the antitrust laws (*id.* at 542), or (3) the nature of plaintiff's claimed injury involves speculative or abstract damage theories (*id.* at 544), or a "tenuous and speculative . . . relationship between the . . . antitrust violation and [plaintiff's] alleged injury." (*Id.* at 545).

2. One salient principle that emerges from the *AGC* decision is the proposition, derived from and developed by the

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[15] The factors to be considered by the courts in assessing a plaintiff's antitrust standing are: (1) defendant's intent to injure the plaintiff (*id.* at 537); (2) the causal connection between the alleged violation and the nature of plaintiff's harm (*ibid.*); (3) whether the injury was of a type that Congress sought to redress under the antitrust laws (*id.* at 538-540); (4) the directness or indirectness between the injury and the market restraint (*id.* at 540-541); (5) whether the damages are speculative because the claimed injury "may have been produced by independent factors;" (*id.* at 541-542); (6) the risk of multiple or duplicative recoveries or complex damage apportionment (*id.* at 542-543); (7) the existence of more direct victims of the violation (*id.* at 542-545).

Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, supra,* that the antitrust treble damage remedy is intended to compensate for a loss resulting directly from a decrease in competition in the market restrained by defendant's antitrust violation. 459 U.S. at 538. This Court held, in *Brunswick* that to recover treble damages a plaintiff "must prove more than injury causally linked to an illegal presence in the market. Plaintiff must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489 (emphasis in original). The Eighth Circuit's holding that NFO was entitled to recover membership dues and marketing fees as antitrust damages cannot be squared with the "antitrust injury" concept described in *Brunswick.*

The Eighth Circuit concluded that petitioner's "unlawful conduct . . . in forcing NFO to lower prices" (NFO II, 292a) warranted recovery of antitrust damages in the form of lost membership dues and marketing fees because "by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume." (*Ibid.*). That conclusion is fundamentally at odds with the *Brunswick* "antitrust injury" test which precludes a damage recovery for loss resulting from enhanced competition "even though such competition was caused by conduct violating the antitrust laws." P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶334.2a at 301 (Supp. 1988)[16]; *cf., Jack Walters & Sons Corp. v. Morton Buildings, Inc.,* 737 F.2d 698, 708-709 (7th Cir.) *cert. denied,* 469 U.S. 1018 (1984) (holding that vertical maximum price-fixing

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[16] The authors explain that: "The last statement may seem contradictory, for it postulates that competition can be simultaneously impaired (thereby violating the antitrust laws) and enhanced (thereby causing the plaintiff non-cognizable losses). There is no real contradiction, because the impairment and enhancement lie in different temporal and market dimensions. . . ." *Ibid.*

resulting in lower prices to consumers does not constitute "antitrust injury").

3. NFO's loss of income in the form of dues and fees traceable to its "having been prevented from achieving the growth [in membership] . . . which it would have achieved but for the conspiracy" does not describe an "injury . . . of 'the type that the [Sherman Act] was intended to forestall'. . . ." *Brunswick, supra* at 487-488 (quoting *Wyandotte Co. v. United States,* 389 U.S. 191, 202 (1967)). An injury that does not flow directly from an interference with the Sherman Act's purpose of "assur[ing] customers the benefits of price competition" (*AGC, supra,* 459 U.S. at 538) does not meet the test of compensable antitrust injury under §4 of the Clayton Act.

NFO is organized for the purpose of acquiring membership sufficient to permit it to override competition and exercise collective bargaining power to fix prices of commodities sold by its members as authorized by the Capper-Volstead Act, 7 U.S.C. §291. (NFO II, 235a, 241a-243a). To award NFO antitrust damages because its price-fixing power was eroded by membership losses attributable to petitioner's conspiracy to monopolize stands the Sherman Act on its head. Awarding recovery to NFO for losses attributable to a weakening of its collective bargaining power would collide squarely with the holding in *Brunswick,* reaffirmed in *AGC* (459 U.S. at 540) that "[NFO] must prove *antitrust* injury which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Brunswick, supra,* 429 U.S. at 489.

NFO's claim of lost dues of dairy farmers whom it failed to attract as members does not reflect damages as "a competitor in the market in which trade was restrained". *AGC, supra* 459 U.S. at 539. It describes indirect derivative injury

stemming from injury to NFO members in the marketing of milk from which NFO claims it suffered damage in the "membership market" for the sale of NFO's collective bargaining services—a national "market" in which NFO seeks to enhance the price received by its members for the sale of their farm products.

While NFO's fundamental purpose of organizing farmers so as to eliminate competition among them in selling their milk may be protected by §6 of the Clayton Act and the Capper-Volstead Act, from the sanctions of the Sherman Act, it does not follow that NFO is entitled to the affirmative protections of that Act and the remedies of §4 for injury which affects only its "organizational and representational activities" (*AGC, supra* at 526 n.10).[17] To award antitrust damages for a loss that diminishes a seller's ability to achieve market power to fix prices is fundamentally at odds with the "general principle that treble damage recoveries should be linked to the procompetition policy of the antitrust laws",

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[17] *Cf. AGC, supra* at 539 where Justice Stevens observed that "the Union's . . . primary . . . goal is not necessarily served . . . by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. At common law—as well as in the early days of administration of the federal antitrust laws—the collective activities of labor unions were regarded as a conspiracy in restraint of trade. Federal policy has since developed . . . a broad labor exemption from the antitrust laws . . . to protect and encourage [their] organizational and representational activities. *Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect.* . . ." (Emphasis supplied). The agricultural cooperative antitrust exemption granted by §6 of the Clayton Act, 7 U.S.C. §17 (applicable to agricultural and labor organizations) has a similar historic origin. *Maryland & Virginia Milk Producers Assoc., Inc. v. United States*, 362 U.S. 458, 464 (1960).

McCready, supra, 457 U.S. at 482, and "authorize[s] damages for losses which are of no concern to the antitrust laws". *Brunswick, supra* at 487.

The "competition" that is of concern to the antitrust laws is the "competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). An injury that does not flow from "[r]estrictions on price and output [which] are the paradigmatic examples of restraints of trade" (*N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984)) is of no concern to the antitrust laws.

4. The panel's holding that NFO has standing to recover dues and marketing fees as antitrust damages is premised on the assumption that a bargaining agency's "organizational and representational activities . . . [are] protected by the antitrust laws" (*AGC*, 459 U.S. at 525-526)—a notion that this Court rejected in *AGC* when it reversed the Ninth Circuit.[18]

This case provides the opportunity for the Court to consider and decide an issue which it acknowledged but left undecided in *AGC*: "whether the direct victim of a boycott who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is [alleged to be] to restrain competition in the relevant economic market." *AGC*, 459 U.S. at 540 n.44.

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[18] On the basis of *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176-1177 (5th Cir. 1976) and *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n.*, 483 F.2d 384, 397-398 (3rd Cir. 1973), the Ninth Circuit had held that the plaintiff Union's "ability to attract membership and represent employees" were activities protected by the antitrust laws. *California State Council v. Associated General Contractors of California*, 648 F.2d 527, 539 (9th Cir. 1980) (Sneed, J. dissenting).

II. THE EIGHTH CIRCUIT'S DECISION DEMONSTRATES A MAJOR CONFLICT AMONG THE CIRCUITS ON WHETHER PROOF OF A RELEVANT GEOGRAPHIC MARKET IS NECESSARY IN A CONSPIRACY TO MONOPOLIZE CASE UNDER SECTION 2 OF THE SHERMAN ACT

There is a sharp and continuing conflict among the circuits as to whether proof of a relevant geographic market is necessary to sustain a conspiracy to monopolize claim under §2 of the Sherman Act. This case is a textbook example of how the antitrust laws may be misused when a private conspiracy to monopolize treble damage action under §2 is permitted to proceed without proof of defendents' power in a properly defined relevant geographic market.

It also demonstrates what can happen when antitrust jurisprudence is untethered from economic reality. Proceeding without a properly defined relevant geographic market makes it impossible to develop a non-speculative damage theory. It results in an incongruous and illogical distinction between a §1 Rule of Reason conspiracy (which all circuits agree requires proof of a relevant market or anticompetitive effect) and a §2 conspiracy which would condemn mere specific intent to monopolize with no requirement of proof of market power or anticompetitive effect. If permitted to stand, the Eighth Circuit's decision, and those circuits which it follows, would impede this Court's efforts to develop a consistent, market oriented antitrust jurisprudence under §§1 and 2 of the Sherman Act.

Certiorari should be granted to remove the conflicts among the circuits, compel adherence to the teachings of this Court and reverse the tendency of litigants to use the antitrust laws to remedy mere business tort conduct contrary to this Court's

admonition that to amount to an unreasonable restraint of trade, "predatory" conduct must have an effect greater than its effect on plaintiff's business because "the antitrust laws . . . were enacted 'for the protection of *competition* not *competitors.*'" *Brunswick Corp., supra,* 429 U.S. at 488. (Emphasis in the original (quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962)).

A. The Eighth Circuit's Decision Illustrates A Conflict Among The Circuits And With The Decisions Of This Court.

The Eighth Circuit's decision to dispense with proof of a relevant market in a §2 conspiracy to monopolize and Rule of Reason conspiracy case under §1 conflicts with the decisions of this Court and other circuits.

Today, the circuits are divided on the question of whether proof of a relevant geographic market is required in a §2 conspiracy to monopolize case. The Third, Fourth, Fifth, Eleventh and District of Columbia Circuits require proof of a relevant market for a conspiracy to monopolize claim under §2.[19] The Ninth, Tenth, Sixth, Second and possibly the Sev-

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[19] Third Circuit: *Fleer Corp. v. Topps Chewing Gum, Inc.,* 658 F.2d 139, 153-154 (3rd Cir. 1981), *cert. denied,* 455 U.S. 1019 (1982) (Exclusive dealing contracts between chewing gum company and baseball players did not constitute conspiracy to monopolize because defendant did not foreclose meaningful competition in the relevant market.).

Fourth Circuit: *American Football League v. National Football League,* 323 F.2d 124, 132 n.18 (4th Cir. 1963).

Fifth Circuit: *Associated Radio Service Co. v. Page Airways, Inc.,* 624 F.2d 1342, 1348 (5th Cir. 1980), *cert. denied,* 450 U.S. 1030 1981); and *Hornsby Oil Co., Inc. v. Champion Spark Plug Co.,* 714 F.2d 1384 (5th Cir. 1983). (District court's failure to instruct jury on relevant market in a dealer termination case brought as a conspiracy to monopolize constituted reversible error; proof of

enth Circuits hold that in a conspiracy to monopolize claim under §2, proof of a relevant market is not necessary.[20] All

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an adverse affect in a geographic and relevant product market are essential to recovery under the Rule of Reason.).

Eleventh Circuit: *Bill Beasley Farms, Inc. v. Hubbard Farms,* 695 F.2d 1341, 1343 (11th Cir. 1983) (A supplier's decision to cease selling to plaintiff and instead to sell its entire output to plaintiff's competitor could not have supported conspiracy to monopolize since there was no proof of a relevant market.).

District of Columbia Circuit: *Parkard Motor Car Co. v. Webster Motor Car Co.,* 243 F.2d 418, 420 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957) (Termination of automobile dealer to appoint exclusive dealer sustained under the Rule of Reason where automobile manufacturer lacked market power.).

[20] Ninth Circuit: *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919 (9th Cir. 1980), *cert. denied,* 450 U.S. 921 (1981).

Tenth Circuit: *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (10th Cir. 1975) (No relevant market required for branded product.).

Seventh Circuit: *United States v. National City Lines, Inc.,* 186 F.2d 562 (7th Cir.), *cert. denied,* 341 U.S. 916 (1951). District Courts in the Seventh Circuit have bridled at and criticized *National City Lines. See, Tire Sales Corp. v. Cities Service Oil Co.,* 410 F. Supp. 1222 (N.D. Ill. 1976) (criticizing *National City Lines*) and *Besser Publishing Co. v. Pioneer Press, Inc.,* 571 F. Supp. 640 (N.D. Ill. 1983) (Competitor's challenge to an acquisition as a conspiracy to monopolize would not require proof of a relevant market, but since the conspiracy to monopolize allegation was a small part of plaintiff's complaint and "was not intended, in the Court's view, to stand alone", it could not be used to defeat defendant's motion to dismiss for failure to define a relevant market.). The Seventh Circuit may have overruled *National City Lines* in *Ball Memorial Hospital v. Mutual Hospital Insurance,* 784 F.2d 1325, 1334-1335 (7th Cir. 1986) (Easterbrook, J.) (Under §§1 and 2 of the Sherman Act, Rule of Reason analysis must begin with an assessment of market power in a properly defined relevant market; unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers; firms without market power bear no burden of justification.).

Sixth Circuit: *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818 (6th Cir. 1982).

Second Circuit: *United States v. Consolidated Laundries Corp.,* 291 F.2d 563 (2nd Cir. 1961) (Relevant market "not in issue" in

that is required is a specific intent to monopolize and an agreement for conduct that under §1 would be judged under the Rule of Reason.

In this case, the Eighth Circuit affirmed the district court finding that NFO had failed to prove a relevant geographic market, and accordingly affirmed dismissal of NFO's actual and attempted monopolization claims. (NFO II, 259a). The Eighth Circuit stated that NFO's proof of relevant geographic market was "problematical" and that NFO did not have a "consistent theory of geography". Therefore, "it [could not] say it was clearly erroneous for the district court to dismiss" the actual and attempted monopolization claims. (*Ibid.*).

The Eighth Circuit then went on to hold that proof of a relevant market in a §2 conspiracy to monopolize case is not necessary, because "attainment or 'dangerous probability' of monopoly power are not at issue". (NFO II, 260a.) According to the Eighth Circuit, a plaintiff proceeding under a §2 conspiracy claim need only establish the "geographic context" of the conspiracy (NFO II, 238a, 260a). This proof "need not be as rigorous as the relevant market showing for other §2 claims." (*Id.* at 238a). Thus, certain that defendants were major marketers of milk produced in a ten state region in the "Midwest" (NFO II, 258a) and that the "predatory"

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conspiracy to monopolize cases); and *Belfiore v. New York Times Co.*, 826 F.2d 177 (2nd Cir. 1987) (Newspaper's decision to integrate forward into distribution potentially actionable as a conspiracy to monopolize if it had the requisite specific intent, but claim here failed for lack of an agreement.). It is not clear that courts in the Second Circuit have followed *Consolidated Laundries. See, Karlinsky v. New York Racing Association, Inc.*, 517 F.2d 1010, 1012 (2d Cir. 1975); *Consolidated Terminal Systems, Inc. v. ITT Communications, Inc.*, 535 F. Supp. 225, 229 (S.D.N.Y. 1983) (The "absence of an allegation as to an individual's share of the purported market precludes a claim of conspiracy to monopolize.").

conduct occurred within the ten state region where NFO was a competitor, the court below concluded that NFO had met the minimal showing of "geographic context" of the conspiracy. The Court of Appeals never found that the "conspirators" conduct had an anticompetitive effect in any properly defined relevant market. Instead, it relied upon its own *de novo* findings of conspiracy and specific intent alone to support the §2 conspiracy claim.

In holding that a §2 conspiracy to monopolize did not require proof of a relevant market, the Eighth Circuit relied upon *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961). (NFO II, 238a). *Consolidated Laundries* misread this Court's decisions in *United States v. Yellow Cab Co.*, 332 U.S. 218, 225-226 (1947) and *United States v. du Pont de Nemours*, 351 U.S. 377, 395 n.23 (1956). In the former case, this Court was concerned with the *amount* of interstate commerce that was necessary to establish Sherman Act subject matter jurisdiction in a §2 conspiracy to monopolize case, not the standards under which a restraint is to be analyzed under §2. In *Dupont*, where this Court did say that a relevant market definition was not an issue, this Court was only commenting upon an earlier decision which was not even concerned with the relevant market.[21]

Resort to early Sherman Act jurisdictional decisions is not necessary to resolve the issue. This Court has only to look to

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[21] The Court in *Dupont* was merely describing the procedural history of this Court's opinion in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). It stated correctly that at that stage in the review, discussed in the *Story* opinion, "the scope of the market was not in issue." Indeed, a review of the history of *Story* clearly indicates a relevant market had been defined but was not contested on appeal. *Paterson Parchment Paper Co. v. Story Parchment Co.*, 37 F.2d 537, 538 (1st Cir. 1930), *rev'd.*, 282 U.S. 555 (1931).

the clear language of §2 of the Sherman Act to confirm that *all* §2 violations have the identical market definition requirements:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty. . . .

The terms "monopolize" and "any part of the trade or commerce" have been consistently interpreted by this Court to require definition of a relevant market in monopoly and attempted monopolization cases. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). Yet, those circuits holding that proof of a relevant market is not required in a conspiracy to monopolize case have held the same language to mean something else for conspiracy to monopolize than for monopolization or attempts to monopolize under the same statute. "The 'any part' language of §2 is applicable to all three of the enumerated offenses. If the 'any part of the trade or commerce' language is held to obviate the need for market definition in §2 conspiracy cases, a similar conclusion would appear to be compelled for actual and attempted monopolization cases . . . ." *The Relevant Market Concept and Conspiracy to Monopolize Cases Under Section 2 of the Sherman Act*, 44 U. Chi. L. Rev. 805, 809 (1977). Thus, there is no statutory support or support from the decisions of this Court to remove the relevant market definition requirement from any part of §2 of the Sherman Act.

B. In Holding That Business Conduct May Be Condemned As "Unreasonable" Under The Sherman Act In The Absence Of A Defined Relevant Geographic Market, The Court of Appeals Has Unsettled And Confused The Settled Course Of Decisions In Rule Of Reason Antitrust Cases.

The circuits which have dispensed with proof of an anticompetitive effect or market power in a properly defined relevant market in §2 conspiracy cases ignore the teachings of this Court and undermine the uniform application of the antitrust laws in Rule of Reason conspiracy cases under §1.

According to the Eighth Circuit, "the essential elements of a §2 conspiracy claim are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affect 'some appreciable part of interstate commerce.'" (NFO II, 238a). This sparce inquiry conflicts directly with this Court's development of the Rule of Reason in its decisions involving conspiracies to restrain trade under §1 of the Sherman Act and unfair and deceptive acts or practices under Section 5 of the Federal Trade Commission Act.

Under the "Rule of Reason", there must either be "genuine adverse effects on competition . . . 'such as a reduction in output'" or else there must be proof of "market definition and market power . . . to determine whether an arrangement has the potential for genuine adverse effects on competition." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986). This Court has consistently held that it is only in the context of a relevant market that an effect on competition can be measured. *See* e.g. *AGC*, *supra*, 459 U.S. at 540 n.44; *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). Market power and relevant market definition are central to

the substantive standards for the Rule of Reason inquiry. Market considerations provide "an objective benchmark" for determining substantive violations of the antitrust laws. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). This Court has thus required proof of market power in a relevant market either as an element of the substantive antitrust violation, *Continental TV, supra, Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984), *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 297-298 (1985), or as a factor in assessing the probable competitive effect of conduct under the Rule of Reason. *Broadcast Music, Inc. v. Columbia Broadcast Sys.*, 441 U.S. 1, 19-20 (1979); *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 104-107 (1984).

Indeed, without proof or consideration of an anticompetitive effect in a relevant market under the Rule of Reason, a non-*per se* conspiracy under §2 would be indistinguishable from a suit for an ordinary business tort. "Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of a rule of reason case. It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979). The distinction goes to the very heart of the antitrust laws. Under Rule of Reason analysis, this Court has required inquiry into the effect of the restraint on competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

If the rule in the Eighth and the other divided circuits are followed, any plaintiff could strip the requirement of proof of market power or anticompetitive effect from a §1 claim, *FTC v. Indiana Federation of Dentists, supra*, and file the action

as a §2 conspiracy to monopolize by simply alleging a specific intent to monopolize. Thus, there would be no consideration of competitive effect in a properly defined relevant market or even any requirement to prove a relevant market in which to assess the actual alleged anticompetitive effect of defendant's conduct. The anticompetitive effect requirement in §1 Rule of Reason conspiracy would not exist for a conspiracy pleaded under §2.

This is precisely what has happened here, and what has happened in other circuits which do not require application of Rule of Reason standards to §2 conspiracies. The circuits which have dispensed with proof of market power in a relevant market and require only an allegation of specific intent to monopolize in §2 conspiracy cases have been forced to deal with challenges by plaintiffs to mergers without consideration of market share data,[22] restraints involving single brand products,[23] forward integration by manufacturers into distribution,[24] predatory pricing with specific intent to monopolize where there are clearly no barriers to entry,[25] and, most recently in the Eighth Circuit, "joint attempts to monopolize" where there has been no showing of market power.[26] Although in some of these cases the defendant was spared because the court could not find a specific intent to monopolize or in other cases the required agreement, it is clear that these cases would have otherwise been subject to dismissal under the

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[22] *Besser Publishing Co. v. Pioneer Press, Inc.*, 571 F. Supp. 640 (N.D. Ill. 1983).

[23] *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1973); *Coleman Motor Co. v. Chrysler Corp.*, 376 F. Supp. 546 (W.D. Pa. 1974).

[24] *Belfiore v. New York Times Co.*, 826 F.2d 177, 183 (2d Cir. 1987).

[25] *International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786, 795-796 (2d Cir. 1987).

[26] *Baxley-De Lamar Monuments v. American Cemetary Association*, 843 F.2d 1154, 1157 (8th Cir. 1988).

Rule of Reason standards of §1 for failure to show anti-competitive effect in a defined market.

This case clearly illustrates the anamolous impact on Rule of Reason standards that results from dispensing with proof of a relevant market in a §2 conspiracy case. After incorrectly holding that a conspiracy to monopolize only requires agreement and specific intent to monopolize without reference to a relevant market, the Eighth Circuit observed correctly that a violation of §2 "necessarily violates Section 1 as an 'unreasonable' restraint of trade." (NFO II, 260a). However, NFO's §1 claim, also dismissed by the district court, never could meet the requirements of §1 under the Rule of Reason because NFO neither proved power in a relevant market or anticompetitive effect in its §2 conspiracy case. The Eighth Circuit's ruling that its truncated §2 standard is equivalent to §1 is hard to square with its own holding in other §1 cases which require proof of power in a properly defined relevant market. *TV Signal Co. of Aberdeen v. American Telephone and Telegraph,* 617 F.2d 1302, 1309 n.8 (8th Cir. 1980). As the Eighth Circuit recently stated in a §1 Rule of Reason case, "[p]roof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the Rule of Reason case' ", *Ryko Mfg. Co. v. Eden Services,* 823 F.2d 1215, 1231 (8th Cir. 1987), because firms lacking market power cannot adopt restraints that have anticompetitive effects. *Ibid. See also Ball Memorial Hospital v. Mutual Hospital Insurance,* 784 F.2d 1325, 1334-1335 (7th Cir. 1986) (Easterbrook, J.) ("Market Power is a necessary ingredient in every case under the Rule of Reason . . . Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without market power bear no burden of justification.");

Superior Court Trial Lawyers Association v. Federal Trade Commission, 856 F.2d 226, 234 (D.C. Cir. 1988). Indeed, "in those instances where power [in a defined market] is a prerequisite to holding an agreement to be an unreasonable restraint of trade . . . it would make no sense to hold the same agreement to be offensive to §2 without power. To require power under §1 before condemning a particular agreement is necessarily to say that the arrangement is . . . not harmful in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize." 3 Areeda & Turner, *Antitrust Law*, ¶839, p. 359 (1978).

Review of this case is warranted to instruct the lower courts that absent proof that a defendant's conduct has resulted in " 'actual detrimental effects, such as a reduction of output' ", *FTC v. Indiana Federation of Dentists*, 476 U.S. at 460, an antitrust plaintiff's threshold burden under §2 of the Sherman Act is to prove that the defendant has, or is in danger of achieving, market shares sufficient to enable him to exercise power to enhance price or reduce output in a properly defined relevant market in which competition is allegedly restrained. 7 P. Areeda & Hovenkamp, *Antitrust Law*, ¶1511, p. 429 (1986).

CONCLUSION

The decisions of the court below raise questions of importance relating to the remedial purposes of the antitrust laws that require answer for the instruction of the Federal judiciory and the antitrust bar. The petition for certiorari should be granted.

Respectfully submitted

SYDNEY BERDE
Counsel of Record
WILLIAM L. SIPPEL
DOHERTY, RUMBLE & BUTLER
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101
(612) 291-9286
Counsel for Petitioner

January 25, 1989